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IN THE

Supreme Court of the United States

IAIN FRASER, *et al.*,
Petitioners,

v.

MAJOR LEAGUE SOCCER, L.L.C., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Contrary to MLS's assertion, the First Circuit's opinion deepens the well-established circuit split over whether a showing of a relevant market is an essential element of a §2 conspiracy to monopolize claim. The Court should grant the petition to resolve the split and effectuate Congress's intent to punish concerted anti-competitive behavior when it created a separate, conspiracy to monopolize offense.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER PROOF OF A RELEVANT MARKET IS AN ESSENTIAL ELEMENT OF A §2 CONSPIRACY TO MONOPOLIZE CLAIM.

A. *Spectrum Sports* Does Not Resolve the Widely Recognized Circuit Split.

The circuits are deeply divided as to whether proof of a relevant market is an essential element of a §2 conspiracy to monopolize claim. The split has been noted by antitrust scholars Areeda, Hovenkamp, Van Kalinowski, and Kintner.[1] Indeed, the court of appeals recognized the split and noted that it was taking the minority position.[2] The ABA pattern jury instructions adopt the approach rejected by the court of appeals and do not require a showing of relevant market.[3]

The Court's decision in *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993), does not resolve the split, but, to the contrary, illuminates the proper distinction between §2's attempt and conspiracy claims. The Court in *Spectrum Sports* held that a plaintiff alleging a §2 attempt to monopolize claim must prove that the defendant had a dangerous probability of achieving monopoly power in a relevant market. *See id.*, at 459. Far from suggesting a similar outcome for a §2 conspiracy claim, the Court clearly distinguished between

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[1] *See* 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION §2.03, at 2-15 (2nd ed. 1999); IIIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶809 (rev. ed. 1996); 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW, PRACTICES PROHIBITED BY THE SHERMAN ACT §14.6 (1980).

[2] "[A] majority of courts that have touched the issue have said . . . that proof of a relevant market, and hence, market power, is not required in a conspiracy to monopolize claim." *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 67 (CA1 2002).

[3] ABA SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-100-C-102 n.3 (1999 ed.).

concerted and unilateral behavior in requiring a showing of dangerous probability of success only for an attempt claim, which is directed at unilateral action. As the Court noted, concerted action to restrain competition "inherently is fraught with anticompetitive risk," *see id.*, at 458 (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768-69 (1984)), while unilateral activity is not.

Claims predicated on concerted anti-competitive behavior require a lesser showing of relevant market and market power. Indeed, under §1, some concerted activities (*e.g.*, price-fixing) are so suspect that no showing of relevant market or market power is required.[4] Similarly, §2 conspiracy to monopolize claims must be predicated on allegations of both concerted behavior and a specific intent to monopolize (*e.g.*, to eliminate competition and charge monopoly prices). Under the reasoning of *Spectrum Sports*, Copperweld, and *American Tobacco Co. v. United* States, 328 U.S. 781, 789 (1946), such concerted behavior specifically intended to achieve a monopoly is inherently more suspect under antitrust law than unilateral action. For this reason, *Spectrum Sports* counsels against importing the relevant market requirement, which is an element of the unilateral offense of attempt to monopolize, into claims asserting a conspiracy to monopolize.

Courts after *Spectrum Sports* are no closer to resolving the circuit split. Four circuits to have considered the elements of conspiracy to monopolize claims in recent years have cited *Spectrum Sports*.[5] Of the four, only one—*Electronics Communication Corp. v. Toshiba America Consumer Products*—cites *Spectrum Sports* as support for the

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[4] *See State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997).

[5] *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Dis. Centers, Inc.*, 200 F.3d 307, 316 (CA5 2000); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1363 (CA Fed. 1999); *Toshiba*, 129 F.3d at 246; *U.S. Anchor Mfg., Inc. v. Rule Indus. Inc.*, 7 F.3d 986, 1001 (CA11 1993).

proposition that proof of a relevant market is a distinct element of a conspiracy to monopolize claim.[6] 129 F.3d 240, 246 (CA2 1997). But *Toshiba* has not resolved the issue even within the Second Circuit. The opinion does not state that it was overruling prior cases to the contrary, nor does it ever explain why, if a showing of market power in a relevant market is required to prove attempt to monopolize, the same showing is also necessarily required to prove a conspiracy to monopolize, which is inherently more suspect. *Id.* Indeed, contrary to the assertion of MLS, there is no uniformity within the Second Circuit district courts since the *Toshiba* decision.[7]

The other three courts of appeals, which do not require proof of a relevant market as a distinct element, list the same elements used by the circuits before *Spectrum Sports*.[8] Since *Spectrum Sports* was decided, no circuit court has expressly held that because a showing of relevant market is required to

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[6] *Toshiba* is the only case MLS cites to show that circuit courts have "almost uniformly" read *Spectrum Sports* to require proof of a relevant market in a conspiracy to monopolize claim. MLS Br. 15.

[7] For example, the decision in *Invamed, Inc. v. Barr Lab., Inc.*, which was rendered after *Toshiba*, does not require proof of a relevant market for proof of a conspiracy to monopolize offense. 22 F.Supp.2d 210 (S.D.N.Y. 1998) ("Invamed's Third Cause of Action, conspiracy to monopolize, is a claim under section 2 of the Sherman Act. To establish this claim, Invamed must allege facts sufficient to support (1) concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize.").

[8] *Intergraph*, 195 F.3d, at 1363 ("a [conspiracy-to-monopolize] claim requires deliberate concerted action with the specific intent to achieve an unlawful monopoly, accompanied by acts in furtherance of the conspiracy"); *Stewart*, 200 F.3d, at 316 ("A conspiracy to monopolize can be established only by proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce."); *U.S. Anchor*, 7 F.3d, at 1001.

prove an attempt to monopolize claim, the same showing is required to prove a conspiracy to monopolize.

B. Requiring Proof of a Specific Intent to Monopolize Is Not the Same as Requiring Proof of a Relevant Market.

MLS downplays the impact of the court of appeals' adoption of the minority view by attempting to harmonize the decision below with other conspiracy to monopolize cases. In doing so, MLS improperly equates two separate legal concepts: specific intent to monopolize and relevant market. While the same evidence that is used to prove a relevant market can sometimes—when the evidence of specific intent is unclear—be relevant to proving specific intent, the two are distinct concepts, determined by different standards that do not require the existence of one to prove the other.

In the context of the Sherman Act, a specific intent to monopolize is the intent "to destroy competition or build monopoly." *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626-27 (1953). Showing a relevant market, on the other hand, requires proof not of the anti-competitive goals of the defendants but of the objective state of the relevant market. Specifically, to prove a particular relevant market, a plaintiff must prove that there are not sufficient available substitutes for the goods or services so that a person controlling such a market would be able to exercise the monopoly power to control price. *See, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

Specific intent, then, measures what the defendant intended to do, while proving the existence of a particular relevant market is only necessary to measure market power. It is *not* necessary for proving the existence of a defendant's intent.[9]

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[9] In this case the required intent was sufficiently evidenced by MLS's own documents, which demonstrated that the MLS Defendants engaged in their conspiracy with a specific intent to suppress players' salaries in the

MLS attempts to eliminate the distinction between specific intent and relevant market by arguing that in order to prove a specific intent, a plaintiff asserting a conspiracy to monopolize must make the same relevant market showing as a plaintiff alleging a unilateral attempt to monopolize. Although proof of the relevant market may be relevant to demonstrating the defendant's specific intent when the evidence of such attempt is ambiguous, that does not justify importing the requirement to prove a relevant market into the offense of conspiracy to monopolize, which substitutes proof of specific intent for any showing of market power.

Indeed, MLS concedes that this Court held, in *American Tobacco*, that market power is not an element of a §2 conspiracy. MLS Br. 22. MLS contends, however, that a showing of relevant market is still required to prove the claim. *Id.* But requiring an independent showing of relevant market without any necessity to prove market power makes no sense. Relevant market is the metric against which the market power of a defendant is demonstrated. Because proof of market power is not required to show a §2 conspiracy—a point that MLS concedes—requiring proof of a relevant market is an unnecessary hurdle that is inconsistent with the Court's decision in *American Tobacco*.

MLS argues that §2 was not intended to apply to those who conspire to monopolize but lack the capacity to fully accomplish their aim. That contention is contradicted by the

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absence of "any other significant domestic professional league to compete for players' services." A-960. *See also* MLS's business plan stating that "In the event that a credible rival league were established, it is probable that the MLS salary structure would be jeopardized," A-7919, and the testimony of Alan Rothenberg, the founder of MLS, that for MLS to "maintain this salary structure" for players, there could not be "any other significant domestic professional league to compete for players' services." A-7683.

language of §2, the aims of antitrust policy, and existing antitrust law. Had Congress not intended to punish those who act in concert with the intent to monopolize but lacked capacity to do so, it would not have used the word "conspire"—it is hornbook law that an actor may be liable for conspiracy even though he could not have fully committed the predicate offense.[10] When a conspiracy is aimed at achieving a purpose that is demonstrably anti-competitive, there is no need to inquire further about the extent to which the conspiracy could have succeeded. The same rationale underlies the Court's well-established jurisprudence that, under §1, concerted behavior designed to fix prices or reduce output are *per se* violations with no need to prove relevant market or market power. Indeed, if MLS were correct that antitrust policy dictated against punishing those who conspire to adversely affect competition without the capacity to do so, all of the Court's §1 *per se* jurisprudence would have to be overruled.

Finally, adopting MLS's position would also render the "combine or conspire" language of §2 entirely redundant. If conspiracy plaintiffs were required to show a relevant market, then no set of facts would give rise to §2 conspiracy to monopolize claim without also giving rise to either a unilateral monopolization claim or a §1 claim. The congressional intent to create a separate conspiracy to monopolize offense would be frustrated, and antitrust policy would suffer because concerted behavior with a specific monopolizing intent would not be sufficiently punished or deterred.

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[10] "Because the essence of a conspiracy is an agreement, a failure to achieve the objective, even if factually impossible, is not a defense." *United States v. Palmer*, 203 F.3d 55, 64 (CA1 2000) (citations omitted).

C. The Court of Appeals' Relevant-Market Holding Involved Questions of Law That Arise in Every Conspiracy to Monopolize Case.

Apparently recognizing the likelihood that this Court would wish to resolve a significant split in the circuits concerning the conspiracy to monopolize offense, MLS not only attempts to minimize the split, but also seeks to obscure the impact of the court of appeals' decision on that split by portraying it as fact specific. MLS cannot obscure the fact that the decision turned on issues of law that are presented in every §2 conspiracy case and that form the basis for the existing circuit split. The trial court required Fraser to demonstrate the same relevant market for §2 conspiracy purposes as he was required to show to support his claims of §2 monopolization and attempt to monopolize. *See* App. at 68a, 75a-78a. The court of appeals affirmed this district court ruling, thus deciding that proof of a relevant market was required for Fraser to prove his conspiracy to monopolize claim. These elements of a §2 conspiracy are the same legal issues presented in every circuit every time a conspiracy to monopolize claim is pleaded. Until the Court determines what those elements are, the uncertainty over this basic question will exist in every §2 conspiracy case.

MLS seeks to paint the court of appeals' decision as entirely fact specific by focusing on the comment that "there may in principle be some cases in which one could argue that a conspiracy claim should be provable without a showing that the alleged market is a real economic market." 284 F.3d, at 68. This comment only strengthens the case for granting certiorari. If the decision below is understood to hold, as MLS contends, that some alleged §2 conspiracies do not require any proof of relevant market, while others do require such a showing, then the court of appeals has in fact announced a new, third legal rule that only further divides the

circuit courts. The decision gives virtually no guidance on how courts should decide when to require a relevant market showing in a conspiracy to monopolize case. It will only further cause division, confusion, and uncertainty among the circuit courts, as different litigants in different parts of the country find that their similar claims are subjected to vastly different legal standards. This is precisely the situation in which certiorari should be granted by this Court.

II. COURTS OF APPEALS MAY NOT DENY A PLAINTIFF THE RIGHT TO A §1 JURY TRIAL BY ASSUMING WHAT ARGUMENTS THE PLAINTIFF WOULD HAVE MADE HAD SUCH A TRIAL TAKEN PLACE.

The court of appeals decided not to remand Fraser's §1 claims because it concluded that Fraser *would* have alleged the same relevant market that he alleged in his §2 claims had he not erroneously been denied the chance to try the other claims to the jury. This decision, which denied Fraser his right to jury trial on his §1 claims, merits review and reversal by this Court.

The court of appeals lacked the power to deny Fraser his right to a jury trial based on speculation as to what Fraser would have argued. Whether its speculation was correct, therefore, is irrelevant. Moreover, because Fraser lost his §1 claims on summary judgment, he never had the chance to develop his §1 argument beyond his pleading. MLS argues that Fraser's "discovery demands, pre-trial proceedings, expert opinions and trial evidence" establish that he would have argued that the U.S. market for Division I soccer players was the only relevant market for his §1 claims, but those post summary-judgment materials reflect the effect of the district court's single entity reasoning, which the court of appeals found to be incorrect.[11] MLS Br. 25. As noted in Fraser's

[11] *See* 284 F.3d, at 58.

petition and by the court of appeals, Fraser would have had an incentive to allege a broader market under §1 than §2. *See* Pet. 21.[12] Fraser should not be denied his right to try his §1 claims to the jury based on speculation that was both erroneous and beyond the court of appeals' power.[13]

CONCLUSION

For all of these reasons, Petitioners respectfully ask the Court to grant Fraser's petition for certiorari.

Respectfully submitted,

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[12] Nor is there any merit to MLS's contention that Fraser would be collaterally estopped from alleging a different relevant market at a §1 trial. *See* Pet. 26-27. As the court of appeals explained, because the legal standards for §1 and §2 are very different, collateral estoppel would not apply. *See* 284 F.3d, at 59-60. Further, because Fraser has alleged that his §1 claim should be judged under the *per se* rule or "quick look" rule of reason, there is a substantial chance that he would not be required to prove any relevant market at all in a trial of his §1 claims. These issues should be remanded to the district court for consideration in the first instance.

[13] MLS's assertion that this case should be decided under federal labor law, and not antitrust law, is completely misleading. The district court rejected this argument, and the court of appeals chose not to address it, for the simple reason that the MLS soccer players are not unionized. *See* A-4897. Federal labor law is therefore not available to the parties as a means to resolve their dispute and the Court's prior decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), is completely inapposite.